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No.

Supreme Court, U.S.
FILED
JAN 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STEPHEN HOLMES,
Petitioner

v.

STATE OF WEST VIRGINIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

STEVEN M. ASKIN
1440 Edwin Miller Blvd.
P.O. Box 1938
Martinsburg, WV 25401
(304) 263-0909
Attorney for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether Petitioner was denied his Fifth Amendment Constitutional Right to remain silent when jurors, after being instructed not to draw an adverse inference of guilt from Petitioner not testifying at his trial relied upon his having remained silent in finding him guilty.

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STATE OF WEST VIRGINIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

OPINIONS BELOW

No opinion exists either in the West Virginia Supreme Court of Appeals or the Circuit Court of Jefferson County, West Virginia. An Order denying Petitioner's request for an appeal is set forth in the appendix at App. p. 50a.

JURISDICTION

The Order denying Petitioner's request for an appeal was entered by the West Virginia Supreme Court of Appeals on November 5, 1987. (App. p. 50a.) This Petition for Writ of Certiorari is being filed within sixty (60) days as required by Rule 20 of this Court and jurisdiction rests upon 28 USC § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Stephen Holmes, hereinafter referred to as your Petitioner, was tried by a petit jury in the Circuit Court of Jefferson County, West Virginia, on the 12th day of August, 1985, upon an indictment charging him with six (6) counts of first degree sexual assault in violation of § 61-8B-1 of the West Virginia Code. At the completion of the trial, he was found guilty of one (1) count of sexual misconduct, a lesser included misdemeanor offense, in violation of § 61-8B-3 of the West Virginia Code and not guilty of all counts charging sexual assault in the first degree.

Petitioner says thereafter, on September 27, 1987, the Court denied Petitioner's Motion for New Trial and on the 25th day of November, 1985, he was sentenced to serve a period of confinement of one (1) year in the Jefferson County, West Virginia Jail upon said conviction, but was permitted to remain free on bond pending appeal of said conviction. Petitioner says thereafter, he filed with the West Virginia Supreme Court of Appeals a Petition for Appeal on the 28th day of November, 1986, and oral argument was made upon said Petition for Appeal on the 3rd day of February, 1987, and thereafter, on the 14th day of July, 1987, the West Virginia Supreme Court of Appeals refused to consider said ap-

peal, in effect, affirming the Orders of conviction and sentence entered by the Circuit Court of Jefferson County on the 25th day of November, 1985.

Petitioner says that on the 28th day of November, 1986, following his having filed a Petition for Appeal in the West Virginia Supreme Court of Appeals, he became aware of evidence of jury misconduct as reported to him by one of the jurors who sat on the petit jury that convicted him. Petitioner says thereafter, on the 27th day of January, 1987, while said appeal was pending in the West Virginia Supreme Court of Appeals, he filed a Motion for New Trial in the Circuit Court of Jefferson County, West Virginia, on the grounds of jury misconduct. Thereafter, the Honorable Thomas Steptoe, presiding Judge of the Circuit Court of Jefferson County, West Virginia, continued a hearing upon said Motion for New Trial until after the West Virginia Supreme Court of Appeals had decided whether to accept the Petition for Appeal that had previously been filed. The Court reasoned that if the West Virginia Supreme Court of Appeals decided to accept the appeal and ultimately reverse the conviction, the matters contained in the Motion for New Trial would be mooted by the action of that Court.

Thereafter, on July 14, 1987, the West Virginia Supreme Court of Appeals refused to accept the Petition for Appeal. Thereafter, on the 5th day of October, 1987, the Jefferson County Circuit Court of Appeals heard the motion to set aside the jury verdict due to jury misconduct. Following the taking of testimony thereon and upon receiving argument of counsel, the Court denied the Motion for New Trial. Thereafter, on the 9th day of October, 1987, the Court again granted a stay of execution of sentence through and until the 4th day of November, 1987, at 5:00 o'clock p.m., to permit counsel for Petitioner to file with the West Virginia Supreme Court of Appeals a Petition for Appeal from the Trial Court's

denial of the Motion for New Trial on the grounds of alleged juror misconduct. Thereafter, on the 4th day of November, 1987, the West Virginia Supreme Court of Appeals refused to consider Petitioner's application for appeal. Petitioner remains free on a Three Thousand Dollar ($3,000.00) bond pending review by this Court.

SUMMARY OF ARGUMENT

The Fifth Amendment guarantees that all persons who are charged with crimes do not have to incriminate themselves. The jurors admittedly considered the Petitioner's failure to testify and based their verdict of guilty upon this consideration. Therefore, the jury's misconduct amounted to a Fifth Amendment violation mandating reversal.

ARGUMENT

Petitioner Was Denied His Fifth Amendment Right To Remain Silent When The Jurors Drew An Adverse And Negative Inference From Him Not Testifying At His Trial And Relied Upon His Remaining Silent In Returning A Verdict Of Guilty.

Petitioner submits this Honorable Court recently considered jury misconduct in the case of *Tanner vs. United States*, —— U.S. ——, 107 S.Ct. 2739 (1987). In *Tanner, supra*, this Court considered whether the denial of a post verdict evidentiary hearing under Rule 606(b) of the Federal Rules of Evidence violated the Defendant's rights pursuant to the Sixth Amendment of the United States Constitution. According to the Sixth Amendment of the United States Constitution:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of the accusations; to be confronted with the witnesses against him; to have com-

> pulsory process for obtaining witnesses in favor, and to have the assistance of counsel for his defense."

In *Tanner, supra*, defense counsel filed affidavits in support of a Motion for New Trial on the grounds that jurors use of alcohol and drugs during trial denies his Sixth Amendment right to a fair and impartial jury. This Honorable Court upheld the denial by the district court judge of an evidentiary hearing involving the testimony of jurors. The Court reasoned:

> "Long recognized and very substantial concerns support the protection of jury deliberation from intrusive inquiry. Petitioner's Sixth Amendment interests in an unimpaired jury, on the other hand, are protected by several aspects of the trial process. The suitability of an individual for the responsibility of jury service, of course, is examined during voir dire. Moreover, during the trial the jury is observable by the Court, by counsel, and by Court personnel. Moreover, jurors may report inappropriate juror behavior to the Court before they render a verdict."

Petitioner submits the above reasons although appropriate when considered in relation to a Sixth Amendment violation are not sufficient safeguards to protect a defendant from a Fifth Amendment violation. In particular, Petitioner says the jurors while being examined on voir dire may not always tell the truth. In addition, when considering a Fifth Amendment violation, neither counsel nor Court personnel can observe the jury during deliberations. In support of these conclusions, Petitioner directs the Court's attention to the transcripts of the original jury voir dire, Court instructions and the motion for new trial hearing held on October 5, 1987.

During jury voir dire the following dialogue occurred between defense counsel and the juror in question:

> "*Question*: Okay, your name is Mr. Carr, Clark Dixon?

Mr. Askin: That's question #2, Mr. Dixon and Mr. Carr. . ."

(Tr. p. 268, trial transcript of proceedings on 8/15/85) App. p. 48a.

"*Question*: Does any member of the jury panel feel that Stephen Holmes is probably guilty of the charge against him if he does not testify in his own behalf?

"*Answer*: (No response.)

"*Question*: Would each member of the jury agree to follow the Court's instruction that Mr. Holmes has a constitutional right not to testify and that you should not consider whether he testifies or not in deciding whether the State has proved its case beyond a reasonable doubt?

"*Answer*: (No response.)

(Tr. p. 268-270, trial transcript of proceedings on 8/15/85) App. pp. 48a-49a.

The instruction that was read to the jurors by the Court following the completion of testimony and before closing arguments is as follows:

"The Defendant, Stephen Holmes, has no duty to take the stand as a witness in his own behalf, and if he does not do so, this is not evidence, and you should draw no inference therefrom as to his guilt or innocence." *You should entirely disregard and not discuss it.*" [Emphasis added] *(Tr. p. 64, trial transcript of proceedings on 8/19/85)* App. p. 47a.

Petitioner submits that from the post-trial testimony of Juror Dixon on October 5, 1987, it is clear that the juror failed to follow not only the original instruction that was given to him when he was selected as a juror, but this later instruction:

"*Question*: Okay, I'll go ahead and just rephrase it or reask the same question. The fact that Mr. Holmes didn't testify on his own behalf, what fact or affect if any did that have on your voting guilty in this case?

"*Answer*: Well, we as the jury, that was about one of the last things we considered in our delibera-

> tion, the fact that well, it was probably the factor that brought across the verdict as far as . . . Well, he didn't get on the stand and testify for himself. And it was considered that that was considered as far as the final verdict due to the fact he didn't get on the stand.
>
> "*Question*: Was it considered favorable or unfavorable?
>
> "*Answer*: Unfavorable that he didn't."
>
> *(Tr. p. 13, post verdict hearing on 10/5/87)* App. p. 18a.

Over objection of the State, he continued to testify as follows,

> "*Question*: Did you feel that the evidence that you heard in the courtroom showed Mr. Holmes was guilty excluding the fact or wiping away the factor. . .?
>
> "*Answer*: No.
>
> "*Question*: But when considered in light of the fact that he didn't testify, that was a factor?
>
> "*Answer*: That was the final factor that was considered."
>
> *(Tr. p. 14, post verdict hearing on 10/5/87)* App. p. 19a.

Petitioner submits from the record, it is obvious that the reasoning of the Court in *Tanner, supra*, as it applies to the Sixth Amendment does not protect a defendant's Fifth Amendment right. A separate reason *Tanner, supra*, does not control the issue in this case is that *Tanner, supra*, involved the issue of whether an evidentiary hearing should be granted to see if jury misconduct had occurred. In Petitioner's case the Court record revealed the testimony that the *Tanner* Court refused to elicit. Furthermore, the above-cited testimony clearly shows the Petitioner was denied his Fifth Amendment right to remain silent without an adverse inference being drawn by the jury.

The protection afforded by the Fifth Amendment of the United States Constitution is a continually evolving concept. This Honorable Court held in *Bram vs. United States*, 168 U.S. 532 (1897):

> "In criminal trials, the Courts of the United States whenever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by the portion of the Fifth Amendment . . . commanding no person shall be compelled in any criminal case to be a witness against himself." *Id.* at 542.

The Court further characterized the Fifth Amendment in *Ullman vs. United States*, 350 U.S. 422 at 426 (1956) as:

> "An important advance in the development of liberty—one of the greatest landmarks in man's struggle to make himself civilized." *Id.* at 426.

In *Murphy vs. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1965) and *Mallory vs. Hogan*, 378 U.S. 1 (1965), this Honorable Court held pursuant to the Fifth Amendment of the United States Constitution if one was granted immunity for testimony given before a state court, a federal prosecution cannot ensue. The Constitution guarantees the right to remain silent and not be prejudiced by such silence.

The Court continued to protect defendants from Fifth Amendment violations in *Griffin vs. State of California*, 380 U.S. 609 (1965), wherein the prosecutor commented on the Defendant's exercise of his right to remain silent. This Court held,

> "We take that in its literal sense and hold that the Fifth Amendment in its direct application to the Federal Government, and in its bearing on the State by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the Court that such silence is evidence of guilt." *Id.* at 615.

The landmark case of *Miranda v. Arizona*, 384 U.S. 436 (1966) discusses the protection that the Fifth Amendment requires. This Honorable Court held,

> "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action if curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of incustody interrogations of persons suspected or accused of crimes contains inherently compelling pressures which work to undermine the individual's will to resist and the compelling to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the *exercise of those rights must be fully honored.*" *Id.* at 467 [Emphasis added]

This Honorable Court has continued to require the state trial courts protect the Fifth Amendment right to remain silent.

In *James v. Kentucky*, 470 U.S. 1086 (1984), the Defendant did not testify at trial. Thereafter, defense counsel moved the Court to "admonish" the jury not to consider his failure to do so as evidence. This Court denied counsel's motion. This Court held:

> "The Kentucky Trial Court violated Petitioner's Fifth Amendment right by refusing to give an instruction requesting that no adverse inference may be drawn from Petitioner's failure to testify. *Id.* at 1089.

In reaching their decision in *James, supra*, this Court relied on *Carter v. Kentucky*, 450 U.S. 288 (1981) wherein:

> "We hold that a state trial judge has a constitutional obligation, upon proper request, to minimize

> the danger that the jury will give evidentiary weight to a Defendant's failure to testify." *Id.* at 305.

See also *U.S. v. Wagstaff*, 822 F.2d 56 (4th Cir. 1987), unpublished opinion.

This Honorable Court has also extended the application of the Fifth Amendment to whether the use at trial of one's post-Miranda silence denies a fair trial.

In *Doyle v. Ohio*, 426 U.S. 610 (1976), this Honorable Court held the administration of Miranda warnings to an arrested defendant gives to that defendant the "implicit assurance" that their choice of silence after his arrest will not be used against him. Since these warnings are required to protect the accused's Fifth Amendment rights by *Miranda v. Arizona, supra*, to attempt to infer to the jury that silence means guilt violates the due process clause of the Fourteenth Amendment to the United States Constitution.

This Court also recognized in *Wainwright v. Greenfield*, 474 U.S. 284 (1986), a like violation occurs when the prosecution attempts to infer that a defendant's desire to remain silent after being administered his Miranda warnings is evidence of sanity. See also *Commonwealth v. Hunsberger*, 516 A.2d 1257, 358 Pa. Sup. 207 (1986).

Although there appears to be no decisions by a Federal Appellate Court, several State Appellate Courts have reached differing conclusions when ruling on this issue. A case directly on point and one Petitioner would request this Court to consider is *Batres v. State*, 727 S.W.2d 83 (Tex. App.—San Antonio 1987). In this case, the Texas Court of Appeals reversed a conviction for sexual assault as a result of the jurors' discussion of the defendant's failure to testify. In this decision, the Court also discussed a number of prior decisions, see *State v. Smith*, 530 S.W.2d 827 (Tex. Crim. App. 1975), *Nacol v. State*, 590 S.W.2d 481 (Tex. Crim. App. 1979), and *Davis v.*

State, 266 S.W.2d 174 (Tex. Crim. App. 1953) and reached the following conclusion:

> "Although the jurors' testimony conflicts as to the discussions effect, it is apparent that the jury thoroughly discussed the Appellant's failure to testify. In *Davis* the Court of Criminal Appeals held that the trial court abused its discretion in not granting a new trial where there was evidence of repeated discussions made during jury deliberations on the failure of the accused to testify." 727 S.W.2d at 86.

Your Petitioner would submit that from the record in his case, the same conclusion must be reached as to the action of his jury during deliberation.

Petitioner feels he is obligated to point out to this Honorable Court the decision in *Heath v. State*, 485 So.2d 1226 (Ala. Cr. App. 1986), where the evidence offered at the hearing upon a motion for new trial was that the jurors had taken into consideration adversely to the defendant the fact that he had not taken the stand as a witness. Following consideration of the juror's testimony, the Court found there to be no error.

Petitioner would submit that the following testimony of Mr. Dixon, to-wit:

> "*Question*: Okay, I'll go ahead and just rephrase it or reask the same question. The fact that Mr. Holmes didn't testify on his own behalf, what fact or affect if any did that have on your voting guilty in this case?
>
> *Answer*: Well, we as a jury, that was about one of the last things we considered in our deliberation, the fact that well, it was probably the factor that brought across the verdict as far as . . . Well, he didn't get on the stand and testify for himself. And it was considered that that was considered as far as the final verdict due to the fact he didn't get on the stand.

Question: Was it considered favorable or unfavorable?

Answer: Unfavorable that he didn't."

(Tr. p. 13) App. p. 18a, is clearly distinguishable from the one question asked by a juror in *Heath, supra,* where there was no evidence or proof offered that the testifying juror or any other juror considered it adversely to the Petitioner. Also, see *State v. Cross,* 519 A.2d 272 (N.H. 1986) and *People v. Reyes,* 728 P.2d 349 (Colo. App. 1986) wherein Courts ruled on their facts contrary to the position of your Petitioner, but Petitioner feels they are distinguishable on the individual facts of each case.

This Petition for Writ of Certiorari invites this Honorable Court to settle this split of authority between the Appellate Courts of these States. See *Cuyler v. Adams,* 449 U.S. 433 (1981).

This Court has frequently ruled in the past that juror misconduct will only be found to exist if the matter that allegedly occurred during jury deliberation is considered an extrinsic influence and not intrinsic. Cases which support his proposition are: *Mattox v. United States,* 146 U.S. 140, 149 (1892), *Parker v. Gladden,* 385 U.S. 363, 365 (1966), *Remmer v. United States,* 347 U.S. 27 (1957), and *Smith v. Philips,* 455 U.S. 209 (1982) and *Tanner v. U.S., supra.* It is your Petitioner's contention that whenever a Fifth Amendment violation is shown to exist, there should be no distinction between whether the matter is considered to be intrinsic or extrinsic. If this Court is not willing to reach such a conclusion, it is your Petitioner's contention that the issue before the Court should be considered an extrinsic influence for the following reasons: Petitioner submits that when jurors are influenced by an external matter, such as a radio announcement, *State v. Johnson,* 111 W.Va. 653, 164 S.E. 31 (1932), a newspaper article, *United States v. Thomas,* 463 F.2d 1061 (CA7 1972), an experiment, *Pendleton v.*

State, 734 P.2d 693 (Nev. 1987) these are no different than the consideration by the jury of the non-evidentiary and prohibited matter, in this case, Petitioner's failure to testify.

CONCLUSION

Petitioner requests that this Writ of Certiorari be granted due to the violation by the juror of his oath and duty not to consider that your Petitioner did not testify during trial. The juror's misconduct in misleading defense counsel during the voir dire and in failing to follow the instruction of the Court constitutes a most egregious wrong. Petitioner submits that if the failure of the Court to instruct the jury on this Constitutional issue is reversible error, then surely the failure of a juror to follow the instruction after swearing under oath that he would do so, must assuredly violate Petitioner's Fifth Amendment right to remain silent.

Respectfully submitted,

STEVEN M. ASKIN
1440 Edwin Miller Blvd.
P.O. Box 1938
Martinsburg, WV 25401
Attorney for Petitioner

APPENDIX

APPENDIX

IN THE CIRCUIT COURT
FOR JEFFERSON COUNTY

Criminal No. 84-F-1

STATE OF WEST VIRGINIA,
Plaintiff,

v.

STEPHEN HOLMES,
Defendant.

A jury trial held in the above-styled matter in the Circuit Court for Jefferson County, in the courthouse thereof, Charles Town, West Virginia, before the Honorable Thomas W. Steptoe, Judge of said court, on the 19th day of August, 1985.

APPEARANCES

On Behalf of State of West Virginia:

Michael D. Thompson, Esquire
Prosecuting Attorney

On Behalf of Defendant:

Steven M. Askin, Esquire
Askin, Pill, Scales & Burke, LC

* * * *

[64] From these considerations and all other conditions and circumstances appearing from the evidence, you may give to the testimony of the witness such credit and weight as you believe it entitled to receive.

If you believe that any witness in this case has knowingly testified falsely as to any material fact, you may, after considering and weighing the testimony of such witness, disregard the whole of the testimony of such witness or give it or any part thereof, such weight and credit as you believe it to be entitled to receive.

The burden is on the State of West Virginia to prove the guilt of the Defendant beyond a reasonable doubt. The defendant is not required to prove his innocence.

The Defendant, Stephen Holmes, has no duty to take the stand as a witness in his own behalf, and if he does not do so, this is not evidence, and you should draw no inference therefrom as to his guilt or innocence. You should entirely disregard and not discuss it.

* * * *

IN THE CIRCUIT COURT
FOR JEFFERSON COUNTY

Criminal No. 84-F-1

STATE OF WEST VIRGINIA,
Plaintiff,

v.

STEPHEN HOLMES,
Defendant.

A jury trial held in the above-styled matter in the Circuit Court for Jefferson County, in the courthouse thereof, Charles Town, West Virginia, before the Honorable Thomas W. Steptoe, Judge of said court, on the 15th day of August, 1985.

APPEARANCES

On Behalf of State of West Virginia:

Michael D. Thompson, Esquire
Prosecuting Attorney

On Behalf of Defendant:

Steven M. Askin, Esquire
Askin, Pill, Scales & Burke, LC

* * * *

[268] THE COURT: Mr. Askin?
MR. ASKIN: Yes, sir, I have some questions.

BY MR. ASKIN:

Q Ladies and gentlemen, if you don't understand any of my questions, please let me know and I'll be happy to repeat them. Has any member of the jury panel either

in military or civilian life ever been a police officer prior to today? Has any member of the jury panel prior to today been a police officer in the military or civilian life?

A (Affirmative response.)

Q Okay, your name is Mr. Carr, Clark Dixon?

MR. ASKIN: That's question #2, Mr. Dixon and Mr. Carr.

BY MR. ASKIN:

Q Is any member of the jury panel related by blood or marriage to anyone who is presently a police officer?

A (No response.)

Q Question four, does any member of the jury panel have a close friend or associate who is a police officer?

A (No response.)

Q Five, would any member of the jury panel be more likely to believe a police officer's sworn testimony than the sworn testimony of a witness who's not a police officer?

A (No response.)

Q Six, has any member of the jury panel ever been the [269] victim of a crime of sexual violence?

A (No response.)

Q Seven, is any member of the jury panel related by blood or marriage to someone who has been the victim of a crime of sexual violence?

A (No response.)

Q Has any member of the jury panel ever been a witness for the State of West Virginia in a criminal case?

A (No response.)

Q Nine, has any member of the jury panel ever been a client of Mike Thompson, the prosecutor, Ralph Lorenzetti, his assistant, Mike Cassell, his assistant, former Jefferson County prosecuting attorney Braun Hamstead, or former Jefferson County assistant prosecutor Melody Gaidrich?

A (No response.)

Q Does any member of the jury panel know on a non-professional but social basis any of these individuals: Mr. Lorenzetti, Mr. Cassell, Mr. Hamstead or Ms. Gaidrich?

A (No response.)

Q Does any member of the jury panel feel that Steven Holmes is probably guilty of the charge against him if he does not testify in his own behalf?

A (No response.)

Q Would each member of the jury agree to follow the [270] Court's instructions that Mr. Holmes has a constitutional right not to testify and that you should not consider whether he testifies or not in deciding whether the State has proved it's case beyond a reasonable doubt?

A (No response.)

Q Is there anything at all about the crime of sexual assault upon a minor that bothers you to such a degree that you would not be able to sit as a juror and consider only the evidence and the instructions as to the law by the Court in reaching your verdict?

A (No response.)

Q Does anyone on the jury panel have children?

A (Affirmative response.)

THE COURT: I guess it would be easier to say, does anyone on the jury panel not have children? Okay, that would be Ms. Vernon, Mr. Bertuccio. . . .

MR. ASKIN: That's my question number 16.

THE COURT: Question 16.

MR. ASKIN: Everyone is affirmative to that except Ms. Vernon and Mr. Bertuccio, your Honor.

THE COURT: Very well.

* * * *

IN THE CIRCUIT COURT
OF JEFFERSON COUNTY, WEST VIRGINIA

Case No. 84-F-1

STATE OF WEST VIRGINIA,
Plaintiff

vs.

STEVE HOLMES,
Defendant

MOTION FOR NEW TRIAL

Now comes the Defendant and moves the Court to reconsider the Motion for New Trial previously heard, considered, and ruled upon by the Court on the grounds that information has been provided as set forth in the attached statement that one of the jurors in determining your Defendant's guilt or innocence failed to follow the instruction of the Court as to the law to the prejudice of your Defendant.

STEVE HOLMES
By Counsel

/s/ Steven M. Askin
STEVEN M. ASKIN
Attorney for Defendant
Askin, Pill, Scales & Burke, L.C.
P.O. Box 1938
Martinsburg, WV 25401
(304) 263-0909

CERTIFICATE OF SERVICE

I, Steven M. Askin, attorney for the Defendant in the foregoing action, hereby certify that I have served a true copy of the foregoing Notice and Motion upon the Plaintiff by mailing same to Michael Thompson, Prosecuting Attorney for Jefferson County, at his address of County Building, Charles Town, West Virginia 25414, by United States first class mail, postage prepaid this 27th day of January, 1987.

/s/ Steven M. Askin
STEVEN M. ASKIN

Statement of: Clark Andrew Dixon, Jr. Age: 38

Address: 105 Gloncaster Dr., Avon Bend, Charles Town, West Virginia

Telephone: 535-6371 Ext. 6329

Place of Interview: Harpers Ferry National Park

Date of Interview: Dec. 15, 1986

This statement was given to R.M. Coltelli, Sr., by: Clark A. Dixon, Jr.

Q. Clark, did you serve on the Steve Holmes jury?

A. Yes.

Q. Have you talked with Steve Holmes about the case, since the case has been tried?

A. Yes, about the middle of November of 1986.

Q. What part did you discuss with him?

A. Mainly the outburst of Mr. Enders, against Mrs. Gibson and some of the things that we didn't know as jurors.

Q. Clark, do you feel that you or other persons were intimidated or pressured by members of the jury?

A. Yes, I believe so, the nature of the case, as ten jurors who pretty much had made up their minds at the start, that he was guilty of sexual misconduct. Due to the fact that I was the only black man juror and the other ten persons were trying to convince me to come over to their side. I felt pressure because I didn't want it to look like I was partial because I was black and he was black. I wanted to be objective, which I was, up until the point that happened between Mr. Enders and Mrs. Gibson in the jury box. When we went back to the jury room, I felt that I wasn't objective because we couldn't and didn't discuss the case. And further, because of

the hostile outbreak of Ms. Enders, toward Mrs. Gibson in the jury room.

Q. Do you feel that the verdict was influenced by the outbreak of Mr. Enders?

A. Yes, because the judge sent us back to deliberate, which we didn't. All Mr. Enders did was shout at Mrs. Gibson, about how they could be brought up on charges of perjury, and the foreman stated that she felt that she could also be brought up on charges of perjury.

Q. Do you feel that the evidence showed Holmes guilty?

A. No.

Q. Why did you vote guilty?

A. Because of the fact that Holmes didn't take the stand and deny the girl's statement about the fact that she said no the first time.

Q. Do you feel that Steve Holmes deserves a new trial?

A. Yes. If it goes to court, but I feel that it should be handled by the Jefferson County Board of Education.

Signed Clark A. Dixon, Jr.

IN THE CIRCUIT COURT
OF JEFFERSON COUNTY, WEST VIRGINIA

Criminal Action No. ———

STATE OF WEST VIRGINIA,
Plaintiff,

vs.

STEPHEN HOLMES,
Defendant.

Proceedings had and testimony taken before the Honorable Thomas W. Steptoe, Jr., Judge, on October 5, 1987.

APPEARANCES:

MICHAEL THOMPSON, Prosecuting Attorney for Jefferson County, Charles Town, West Virginia.

STEVEN ASKIN, Counsel for Defendant, Martinsburg, West Virginia.

DEFENDANT in person.

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[3] (Portion of proceedings had and testimony taken in chambers with the Defendant and counsel present.)

COURT: All right, let the record show that we have reconvened in the jury room which is going to suffice as chambers for the purposes of this next motion. Mr. Askin, you may proceed, sir.

MR. ASKIN: Well, Your Honor, probably the appropriate thing to do would be to call Mr. Dixon.

MR. THOMPSON: I would like to object at this particular time, Your Honor. I think that I need to object to protect the record. This evidence was discovered I believe in December of last year. Mr. Askin had an opportunity to present this matter with his appeal to the state Supreme Court without having it heard here first. I objected when the matter was initially raised back I believe in April of this year, March or April of this year, to it being heard at all. I don't think the law of this state as expressed in State V. (Scotchell) will allow this particular matter to be heard by the Court. And I would ask Your Honor not to hear this case, not to hear this evidence, and not to allow this verdict to be impeached under the standard that's set out in State V. (Scotchell).

COURT: [4] Mr. Askin, do you wish to be heard?

MR. ASKIN: Upon the procedural issue, Your Honor, only at this time. Procedurally Mr. Thompson I think is incorrect when he states to you that we could present to the Supreme Court sua sponte a ground of error that hasn't first been raised in the circuit trial courts. The Supreme Court will not consider matters that would be considered newly discovered evidence or new grounds of evidence, new grounds of error, or any of the above until you first give a trial Court an opportunity to pass on it. And if I had attempted to modify the petition for appeal that had been filed in the Supreme Court and the Clerk's records will reflect the exact date it was filed, I don't know, your file will probably reflect the

date we filed the petition, it may be in the jacket, Judge, I think sometimes the petitions for appeal should be in the file or date in the file jacket, if they do it that way in this county. If not it should be in some kind of a record kept I'm sure showing when each document comes into the file. Most clerks' offices have that and I'm sure this one has it also. But in any event if that's significant to any decisions to be made this morning, I'm not aware of any procedure that would permit the Supreme Court to hear an issue except under an extraordinary remedy. And the statute and the rules do permit extraordinary remedies, prohibitions, and things [5] of that nature. So as Mr. Thompson said, we came before the Court in April, I think it was the 28, and the record relected clearly Mr. Thompson objected to it. And the order that was entered specifically said that upon the Court overruling his motion, the matter was continued until the Supreme Court ruled upon the petition for appeal, and if the appeal was successful, the issues to support this motion would be mooted. So Your Honor has already passed on the procedural issue, and in fact gave Mr. Thompson his leave to object and said specifically that we'd bring it on for hearing. So you know, if there is a new rule of procedure or case that says you can include it in your original petition for appeal, matters that have never before been presented to the trial Court Judge, thus we're removing from the trial Court Judge the opportunity to pass upon the legal issue, I'll be glad to be made aware of it or any responsive argument. But I don't really think that's the law today and I don't think it has ever been the law in this state. Trial Court Judge must always be given the opportunity to determine whether something is fair or unfair or incorrect or correct before Supreme Court passes upon it in a direct appeal situation.

COURT: Well, gentlemen, I am satisfied that this is a matter that should not have been raised first with the Supreme Court, but [6] rather was properly first raiseed

in this court. If my recollection serves me correctly and it may not, Mr. Askin brought this matter on in April and the Court ruled at that time that it would not entertain the motion then until the Supreme Court had decided whether or not it was going to reverse or grant the appeal or do anything itself on the main case. And that was basically a judicial economy ruling because I did not wish to be in a position of whether to decide whether or not to impeach the verdict of the jury while the issue of the original trial was before the Supreme Court. So I'll note the State's exception and take the position that this matter is properly before the Court. Mr. Askin, do you wish to call your first witness?

MR. ASKIN: Yes. Mr. Clark Dixon.

MR. THOMPSON: Your Honor, might I cite some authority to the Court for why testimony should not be taken?

COURT: Well, you are citing the (Scotchell) issue—

MR. THOMPSON: And I. v. U. S, the testimony of jurors should not be received to show matters which essentially impair in the verdict itself. And I would think that that U. S. Supreme Court [7] decision and 232 Supreme Court 793 and also (Scotchell) would control the kinds of testimony that Your Honor could receive. If Your Honor concludes at any time that the information that is being testified to is testimony of matters that essentially inhere in the verdict, then I think Your Honor should not consider it. While Mr. Askin may avouch the record with that kind of information. I would think that under (Scotchell) that is not proper evidence for Your Honor to consider.

COURT: Well, it's an interesting point, Mr. Thompson, because the federal rules of evidence have a particular section which deals with that issue. I think it's rule it's Rule 606 B. of the Rules of Federal Evidence. It says upon an inquiry of validity of a verdict or indictment, a juror may not testify to any matter or statement occurring during the course of the deliberations or

to the effect of anything upon his or other jurors mind or emotions as influencing him to assent to or dissent from the verdict or indictment concerning his mental process in connection therewith except the juror may testify on the question whether extraneous prejudicial information was improperly—etcetera. Now you note that when West Virginia adopted its rules of evidence, it did not include that section although this seems to tract the rule against (Scotchell). Now the reason I want to hold this in chambers is I think that Mr. [8] Askin ought to have an opportunity to have this witness testify and I ought to have an opportunity to hear it to see if there is anything extrinsic that may have possibly gone wrong with this jury trial. But because the policy is that if it's a problem that the juror perceive which is inherent in the process, that should not be splashed upon the public record and brought out improperly. So that's why I asked to do this in chambers. I think I have to hear from this juror to determine whether or not there are any improper influences on that jury that would justify this Court in setting aside the verdict. And in either event, I think Mr. Askin ought to have an opportunity to make a record. But there's an inherent public policy in this rule as the State is well aware, and the State is trying to assert that and that is why I wished to do this in chambers.

MR. THOMPSON: Very well.

COURT: Mr. Dixon is his name.

(Witness was thereupon duly sworn to testify by the Clerk.)

COURT: Mr. Askin, you may proceed, sir.

DIRECT EXAMINATION

BY MR. ASKIN:

Q. Sir. would you please state your full name and spell [9] your last name?

A. My name is Clark Andrew Dixon, Junior, D-I-X-O-N.

Q. And where do you live, Mr. Dixon?

A. Presently I live in Ranson, West Virginia, Orchard Hills.

Q. And that is in Jefferson County, West Virginia?

A. Yes, sir.

Q. And how long have you lived in Jefferson County?

A. About 18 years.

Q. What is your current occupation or employer?

A. I'm a park ranger with the National Park Service in Harpers Ferry, West Virginia.

Q. How long have you been employed with the park service?

A. Fifteen years.

Q. And are you married?

A. Yes.

Q. And how many children do you have, sir?

A. I have four children.

Q. Do you participate in or are you active in any community agencies, organizations, or associations in Jefferson County?

A. Yes, I'm involved in Boy Scout programs, Boy Scouts, Cub Scouts, Girl Scouts.

MR. THOMPSON: I am going to object to the relevancy of all this. We're [10] here for one purpose and that is to get to the issue.

MR. ASKIN: Well, I think it's relevant to find out a little bit about the person who is a witness, Your Honor.

COURT: Well, his credibility has not been made an issue as of yet. If it is, then I should think that that would be appropriate.

MR. ASKIN: All right. If the Court feels it inappropriate—.

COURT: Well, it may become appropriate. We'll see what the State does.

MR. ASKIN: Q. Mr. Dixon, you served as a juror in the case of State v. Holmes, is that correct, sir?

A. Yes.

Q. And I don't know how many other cases you served as juror, but that was during the, I believe it was the summer of 1985, wasn't it? Do you recall the month that you served—were you able to recall without me referring to the court file?

A. No.

MR. THOMPSON: We'll stipulate—the State would stipulate that Mr. Dixon was a member of that jury.

[11] MR. ASKIN: Thank you.

COURT: When was that case tried?

MR. ASKIN: Sometime in '85. I believe it was summer of '85.

MR. THOMPSON: I will concede that he was indeed a juror on that particular case.

MR. ASKIN: August of 1985 according to Mr. Holmes.

MR. ASKIN: I'd like to ask you, Mr. Dixon, if you recall two things. I'm going to direct your attention to two matters that I'd like the Court to consider regarding the verdict that was returned in that case. First, do you recall the Court at any time prior to your being selected as a juror, either the Court itself or myself as counsel for Mr. Holmes directing to yourself and other members of the jury panel questions about Mr. Holmes right to remain silent?

A. You asked do I recall?

Q. Do you remember myself or the Court, His Honor, asking yourself questions about the right of the defendant in that particular case, of course, Steven Holmes, had to remain silent?

[12] A. I believe I do, yes, sir.

Q. I'd like to ask you if during the time that you were serving in that jury, you recall Mr. Holmes did or did not testify?

A. He did not.

Q. What effect if any did that play in your deliberating as a juror in this case?

MR. THOMPSON: Objection.

COURT: State your grounds.

MR. THOMPSON: It appears in the verdict.

COURT: We are talking about the mental process.

MR. THOMPSON: State V. (Scotchell, I. v. U. S.)—

MR. ASKIN: Well, I've got about six case to indicate that something of that nature is something that is material and relevant to the Court's consideration. And you know, if it's time to argue the law before you make the record. Now there's not a jury here so there's no problem with you hearing the evidence.

COURT: [13] Well, I'm going to take the objection under advisement and permit you to go ahead and make your record.

MR. ASKIN: Could the Court Reporter read back the last question because my train of thought has been broken by the objection.

(Final question was thereupon read by the Court Reporter.)

MR. ASKIN: Did you hear the question she read back to you?

A. Read it again, please?

Q. Okay, I'll go ahead and just rephrase it or reask the same question. The fact that Mr. Holmes didn't testify in his own behalf, what fact or effect if any did that have on your voting guilty in this case?

A. Well, we as a jury, that was about one of the last things we considered in our deliberation, the fact that well, it was probably the factor that brought across the verdict as far as—well, he didn't get on the stand and testify for himself. And it was considered that that was considered as far as the final verdict due to the fact that he didn't get on the stand.

Q. Was it considered a favorable or unfavorable?

A. Unfavorable that he didn't.

MR. THOMPSON: Note my continuing objection.

COURT: [14] So noted.

MR. ASKIN: Q. From the evidence had itself that was heard in the courtroom, did you feel that the evidence showed Mr. Holmes was guilty excluding that fact?

MR. THOMPSON: Objection. Note my continuing objection.

MR. ASKIN: I have no objection to his continuing objection.

COURT: So noted.

MR. ASKIN: Q. Did you understand?

A. From the evidence that was heard in the courtroom?

Q. Yeah.

A. Do I feel that Mr. Holmes was guilty?

Q. Did you feel that the evidence that you heard in the courtroom showed Mr. Holmes was guilty excluding the fact or wiping away the factor—.

A. No.

Q. But when considered in light of the fact that he didn't testify, that was a factor?

A. That was the final factor that was considered.

Q. Do you recall the circumstance that occurred during the [15] jury returning to the courtroom where His Honor directed you and the other members of the panel to go back into chambers for, I guess to deliberate? Would you explain what happened during that brief period of time out in the courtroom?

A. When we got back in here?

Q. Wherever you went to before you came back in.

A. Well, when we got—when we returned to the jury room here, we had one of our jurors just about lost his mind. He was just ranting and raving and talking about—well, he mentioned the fact that what happened on the stand—I mean, not on the stand, in the jury box out there with one of our jurors breaking down emotionally, that we could have been perjured—brought for perjury charges because—.

MR. THOMPSON: I'm going to object to all of this. This is hearsay, Your Honor. That witness isn't here.

I don't know what exception that would come in under. This is basically what another juror might have said. And I think the public policy of this state is against this kind of impeachment of a verdict. That certainly took place in the jury room, certainly adhere as a verdict. And I again renew my continuing objection. But here again, I will object because this is blatant hearsay. This party is not here and not been subpoenaed.

COURT: [16] Your objection will be taken under advisement. You may proceed, sir.

A. The—one of the jurors ranting and raving and he was very angry that all of a sudden we were sent back here to deliberate or we'd come to a real final conclusion. And we really didn't talk about it or—a lot before we went back out to be back in the stand—in the jury box. It was very uncomfortable coming back in here.

MR. ASKIN: I have no other questions, Your Honor, on the issues.

COURT: Okay. Mr. Thompson, does the state have any questions?

MR. THOMPSON: The state has no questions, Your Honor. The state again renews all of the objections that have been made with—all of this appears in the verdict. It should not be considered by Your Honor.

COURT: I have a question or series of questions.

BY THE COURT:

Q. Mr. Dixon, did you contact any of the Court officers about your concerns or were you contacted by someone else?

A. About back here?

Q. About what you have testified.

[17] A. No, I didn't. You know, once it was over,

Q. Well, how did you come to file an affidavit? Did somebody contact you?

A. Well, once—well, it was quite a few months, maybe almost a year it was, just discussing this case with Mr.

Holmes and just explaining what—I just asked him shall —had some misgivings.

Q. Did you initiate the conversation?

A. Yes. I just had some misgivings about the final outcome and I just wasn't all that easy even though—.

Q. How long after the verdict did this conversation take place?

A. Oh, this is was August of '85. It probably was spring of—well, it was during the time when some construction was going on in Harpers Ferry on a wall. And I'm thinking it was spring or summer of '86.

COURT: Very well. Any further questions from the defense?

MR. ASKIN: Just to possibly assist Mr. Dixon.

BY MR. ASKIN:

Q. Mr. Dixon, do you recall just for the purpose of refreshing your memory in a written statement that you gave to an investigator in December of 1986 that you indicated that your [18] conversation with Mr. Holmes would have been around the middle of November of '86?

A. Well, it would have—okay.

Q. I realize it's been a long time.

A. Yes, it has been. That would be it.

MR. ASKIN: Your Honor, I think the affidavit that we submitted or the document that we submitted in the record would reflect the information that this conversation would have been initiated around the middle of November of 1986. We immediately then had an investigator, December of '86, interview Mr. Dixon, file our motion shortly thereafter. But I have no other questions.

COURT: Anything further from the state?

MR. THOMPSON: No, Your Honor.

COURT: May we let Mr. Dixon go?

MR. ASKIN: Yes, indeed. He is free to go.

MR. THOMPSON: Are parks only for rangers only?

A. No. Parks are for the people.

MR. THOMPSON: [19] See you, Clark.

(Argument of Counsel was thereupon presented whereupon Ruling of Court was given as follows:)

COURT: Thank you, gentlemen. I think that the quality of argument in both counsel on this matter has been very high. I compliment Mr. Thompson and Mr. Askin for excellent argument on this point.

These cases that have been cited, I want to discuss at least one of them as we pass along because there's one among them that I think is more closely attunded to the facts of this particular case than the others. And that is the case of (Escarseca) v. Texas. But we'll get to that in due course.

Gentlemen, the—I think Professor Cleckley fairly and succinctly—very succinctly states the law of the State of West Virginia pertaining to this type of motion. It says—he says on Page 183 of the Second Volume, "The maintenance of secrecy and inaccessibility of the deliberation process has been deemed an important policy doctrine in the federal and most state judicial systems. Balancing the right of a defendant to a fair trial before an impartial jury against the dangers inherent and unfettered attempts to delve into the deliberating mind and the attendant risk to injury to jurors, the courts have consistently asserted that the latter must weigh more heavily on the scales of judicial imperatives. The Supreme Court of United [20] States made this clear in McDonald versus Pless. In addition to harrassment of jurors and the publication of private deliberations, numerous other factors militate in favor of this public policy. These factors include the increasing potentiality for jury tampering, the uncertainty of verdicts and intolerable burden which would be placed on courts. Similarly, jurors as well as litigants are entitled to the benefits of the presumption that they have done their duty in accordance with their oaths. Based upon the above considerations, it is settled law that a juror cannot impeach his own verdict and that he is incompetent to testify to facts which inhere in the verdict." And he cites U.S.

versus Blankenship, 1983 case, U.S. versus Barber, a 1982 Fourth Circuit case. In Hyde versus United States, 225 U.S. 347, 1912, the Supreme Court stated that quote, "The testimony of jurors should not be received to show matters which essentially inhere in the verdict itself and necessarily depend upon the testimony of the jurors and can receive no corroboration." "In an earlier decision the Supreme Court held that quote, "On a motion for new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations is inadmissible either to impeach or to support the verdict. But a juryman may testify as to any facts bearing upon the question of the existence of any extraneous influence, [21] although not as to how that influence operated upon his mind. So a juryman my testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been given as ground for new trial" end of quotes. Mattox versus United States. While this rule can be criticized as forbidding inquiry into the subject most truly pertinent, it represents a pragmatic judgment how best to reconcile the irreconcilable. Where a extraneous influence is shown, the court must apply an objective test, assessing for itself the likelihood that the influence would affect a typical juror. An example of the approach is found in McDonald versus Pless where the jury had arrived at their verdict by the arbitrary and unjust means of taking the quotient of the amounts of the various members thought the plaintiff should receive. At least one juror thought he should receive nothing. The Court found that testimony of this conduct could not be used to impeach the verdict." Then it also goes into a discussion of Rule 606(b.) and the federal rules of evidence which does not exist in our rules. Also professor Cleckley goes on to say that, "A juror may testify concerning any mental bias in matters unrelated to the specific issues that the jurors were called upon to decide and whether extraneous prejudicial information was im-

properly brought to the juror's attention" cited several cases. "But a juror cannot testify about the mental process by which the [22] verdict was arrived at." Under the next paragraph down Cleckley says, "The decisions in West Virginia are in accord with the federal doctrine set forth above." And he says, "See also State versus Scotchel, 285 Southeast Second 384, (West Virginia 1981) where the Supreme Court of Appeals stated that quote, "A jury verdict may not ordinarily be impeached based on matters that occur during the jury's deliberative process which matters relate to the manner or means the jury uses to arrive at its verdict." End of quotes. Then Professor Cleckley goes on to discuss, "A distinction exists between matters which inhere in the verdict and those which do not. Although a juror cannot testify to matters contained in his personal consciousness, that is, motive, which are not accessible to other testimony, he is competent to be jeard as to the existence of overt acts or improper influences irregularity. Courts recognize that a jury verdict may be impeached for matters of misconduct extrinsic to the jury's deliberative process, State v. Scotchel. He gives following as examples of irregularity—well, I believe that Mr. Thompson referred to these previously on the record. I will just simply note—.

MR. THOMPSON: Not all of them.

COURT: He went ahead and gave examples of matters which inhere in [23] the verdict, that is motive. "Affidavit of juror that the jury misunderstood court's entrapment instruction. Walker versus United States. Ordinarily, a juror's claim that he was confused over the law or evidence and therefore participated in the verdict pm an incorrect premise is a matter that inheres or is intrinsic to the deliberative process and cannot be used to impeach the verdicts, State v. Scotchel. Attorney's statement that he had been informed by a juror that the jury while deliberating had read inadmissible evidence about the defendant in the newspapers, Crosby versus

United States. Juror's affidavit that another juror stated that the defendant would get probation and that the affiant did not fundamentally believe in the defendant's guilt. Klimes versus United States. Affidavit by juror that the juror misunderstood material evidence and that upon proper understanding the verdict would have been different. State versus Preece, 1935 West Virginia case. The general rule is that statements relative to intimidation or coercion by fellow jurors cannot ordinarily be received to impeach the verdict. State v. Scotchel." Scotchel seems to be the major case stating the West Virginia position. The opinion was written by Justice Miller. And during the opinion he said the reason traditionally advanced to include impeachment of the jury verdict based on what occurred during deliberations is primarily grounded on public policy protecting the privacy of the jurors. [24] This policy prevents both litigants and the public from being able to gain access to the jury's deliberative process. This proposition is the recognition that insuring the privacy of the jury's deliberations will promote a full, frank, and free discussion of all the issues submitted to the jury. It is also recognized that the very nature of the deliberative process which requires the jurors to arrive at a unanimous verdict must of necessity require a combination of individual views. This process of accommodation should should not be utilized as a means to attack the general verdict. The rule against impeachment of the verdict must be from tampering with influence of individual jurors after the verdict has been rendered. There is also recognized that limiting impeachment promotes finality of jury verdicts. Majority of courts recognize that a jury verdict may be impeached for matters of misconduct extrinsic to the jury's deliberative process. Included in this exception is the impeachment of the verdict if one or more of the jurors who sat in the case was initially biased or prejudiced against the party. That's later on in the opinion. Then it discusses West Virginia

cases and on Page 389 they said, "The affidavit in the present case is confined to events that occurred during jury's deliberations. Defendant first alleges that a juror named in the affidavit stated his wife had been convicted of assault and battery and the penalty for this offense was a fine. Another [25] juror agreed that the penalty was a fine. As a consequence the impeaching juror in her affidavit claims she was misled on the basis that the defendant would only receive a fine. It is generally acknowledged that the juror's claim he was confused over the law or evidence and therefore participate in a verdict on an incorrect premise is a matter that inheres or is intrinsic in deliberative process and cannot be used to impeach the verdict. The impeaching juror further did verbally abuse me during deliberations and cause me to vote against my convictions. This allegation is another matter intrinsic to the jury's deliberations. While there may be some occasion where the facts might be sufficient to warrant a trial Court to make further inquiry on this point, such is not the case before us. Of some importance is the fact that after the jury verdict was announced, the jurors were separately polled and all acknowledged their assent to the verdict. The general rule, statements relevant to intimidation or coercion by fellow jurors cannot ordinarily be received to impeach the verdict. The obvious danger in permitting such a practice is coercion and intimidation are rather subjective terms and may vary according to the individual personalities of the jurors. Then it went on to say that they found no merit in the impeaching juror's two final allegations.

Well, let me further—the juror in this case apparently [26] approached the defendant in November of 1986 which is more than a year after the trial in this case which was held in August of 1985. And indicated to the defendant something to the effect that I didn't think the evidence was sufficient, but since you didn't testify, I found you guilty. Something along those lines. And that, of course, has led to to this matter being brought to the

attention of the Court and raising the issue. Today Mr. Dixon testified that the fact that Mr. Holmes did not take the stand in his own defense was something that was widely discussed by the other jurors. And he felt it was a material issue weighing upon the verdict of the jury—of all of the jurors. He also indicated and suggested that there might have been some intimidation by one juror against some other jurors. Basically what he testified to in that regard is hearsay. However, he did testify that although believed that the evidence was not sufficient to support a finding of guilt, that he went ahead and found the the defendant guilty because he did not take the stand in his own defense. That is not hearsay. He is basically talking about his own motives and agreeing to a verdict of guilty. So I think that that is admissible upon the record at least within the context of the rules of evidence. Now whether it's admissible with regard to the Scotchel rule, we'll have to discuss. What Mr. Dixon basically told the Court today was that either he didn't understand the Court's [27] instructions concerning the fact that a defendant is not to be prejudiced by the fact that he declines to testify or that he ignored that rule. We are talking about whether a juror followed an instruction or not. And the evidence doesn't seem to suggest that this juror had any kind of bias against Mr. Holmes at all. And that he did not seek to convert this trial into something less than due process. However, it is clear from his testimony that he did not follow the Court's instruction.

Now I indicated earlier there's one case that Mr. Askin has found which I believe closely parallels this case in that regard. At least in the regard of the Court's analysis. And that's (Escarzia) versus Texas. There was some procedural comings and goings in this case which really don't bear. But on page 402, now this case by the way is 711 Southwest Second 400, and on page 402 towards the end of the first column it says, "In the motion for new trial appellate presented affidavits of

Jurors David (Orosco) and Margaret R. Smith. Both stated that during deliberations on guilt or innocence, they had discussed certainy that Apellant Speulevda would be placed upon probation, and that such discussion materially affected their decision to find the defendant guilty. Apellant's co-defendant at the hearing on the motion were introduced where both jurors gave testimony. Juror Smith testified that the discussion of appellant's application for probation affected her decision as [28] to the guilt or innocence of appellate. Juror (Orosco) also testified that the discussion of probation affected his decision. (Orosco) stated that had he believed appellate was ineligible for probation, he would have found apellate not guilty. (Orosco) admitted that he voted for guilty verdict although believing appellate not guilty. His guilty vote was made on the condition that appellate would receive probation. The Court's charge instructed the jury that their quote "sole duty at this time is to determine the guilt or innocence of the defendant under the indictment in this cause and restrict your deliberations solely to the issue of guilt or innocence of the defendant" end of quotes. As indicated by testimony at the hearing on the motion for new trial, the jurors disregarded these instructions. The test for jury misconduct asks first whether there was misconduct, and second, did it result in harm. Clearly the facts of this case meet both requirements, etcetera. They overturned it. Now the question is does the Texas analysis jive with the West Virginia cases. Now Mr. Askin has made an interesting argument on that point, but I think that the telling phrase is in State versus Scotchel where the Court says it is generally acknowledged that a juror's claim that he was confused over the law or the evidence and therefore participated in the verdict on an incorrect premise is a matter that inheres in or is intrinsic to the deliberative process and cannot be used to [29] impeach the verdict. I believe that a fair reading of these cases indicate that the Texas case does not govern in West

Virginia. And if I was of an alternative opinion, I would be inclined to grant a new trial in this case because I think that this case falls within the Texas case. But I don't believe that that is the law in the state of West Virginia, although I hope that this matter will be taken to the Supreme Court for some clarification. So I am going to overrule your motion and note your exception.

(Portion of proceedings were thereupon concluded.)

STATE OF WEST VIRGINIA

COUNTY OF JEFFERSON, to wit:

I, Terry L. Crock, CSR, RPR, Official Reporter for Jefferson County, West Virginia, do hereby certify that the foregoing transcript meets the requirements of the Code of the State of West Virginia, 51-7-4, and all rules pertaining thereto as promulgated by the Supreme Court of Appeals.

/s/ Terry L. Crock
TERRY L. CROCK, CSR, RPR
Official Reporter

IN THE CIRCUIT COURT
OF JEFFERSON COUNTY, WEST VIRGINIA

Criminal Action No. 84-F-1

STATE OF WEST VIRGINIA,
Plaintiff

vs.

STEPHEN HOLMES,
Defendant

[Filed Oct. 30, 1987]

NOTICE OF FILING PETITION FOR APPEAL
AND MEMORANDUM OF ARGUMENT AND
TRANSMISSION OF RECORD TO THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

TO: The Honorable Doris Whiting
Clerk of the Circuit Court
of Jefferson County, West Virginia

and

Michael Thompson, Prosecuting Attorney
for Jefferson County, West Virginia

You are hereby respectfully notified that the Petition for Appeal and Memorandum of Argument has been filed with the Clerk of the Circuit Court of Jefferson County, West Virginia, and the Clerk is requested to forward the Petition, Memorandum of Argument, and a complete record to the Supreme Court of Appeals of West Virginia, pursuant to law.

/s/ Steven M. Askin
STEPHEN M. ASKIN

STATEMENT OF THE CASE

Stephen Holmes, hereinafter referred to as your Petitioner, was tried by a petit jury in the Circuit Court of Jefferson County, West Virginia, on the 12th day of August, 1985, upon an indictment charging him with six (6) counts of first degree sexual assault. At the completion of the trial, he was found guilty of one (1) count of sexual misconduct, a misdemeanor and not guilty of all counts charging sexual assault in the first degree.

Petitioner says thereafter, on the 25th day of November, 1985, he was sentenced to serve a period of confinement of one (1) year in the Jefferson County Jail upon said conviction, but was permitted to remain free on bond pending appeal of said conviction. Petitioner says thereafter, he filed with this Court a Petition for Appeal on the 28th day of November, 1986, and oral argument was made upon said Petition for Appeal on the 3rd day of February, 1987, and thereafter, on the 14th day of July, 1987, this Honorable Court refused to consider said appeal, in effect, affirming the Order entered by the Circuit Court of Jefferson County on the 25th day of November, 1985.

Petitioner says that following his having filed a Petition for Appeal on the 28th day of November, 1986, he became aware of evidence of jury misconduct as reported to him by one of the jurors who sat on the petit jury that convicted him. Petitioner says thereafter, on the 27th day of January, 1987, he filed a Motion for New Trial on the grounds of jury misconduct and thereafter, the Honorable Thomas Steptoe, Judge of the Circuit Court of Jefferson County continued a hearing upon said Motion for New Trial until after this Court had decided whether to accept the Petition for Appeal that had previously been filed, reasoning that if this Honorable Court decided to accept the appeal and reverse the conviction, the matters contained in the Motion for New Trial would be mooted by the action of this Court.

Thereafter, upon this Honorable Court on July 14, 1987, refusing to accept the Petition for Appeal, Petitioner was permitted to remain free on bond pending a hearing and decision upon the previously filed Motion for New Trial and also, upon Petitioner's Motion to reconsider the previously imposed sentence. Thereafter, on the 5th day of October, 1987, both matters were heard by the Circuit Court of Jefferson County and following the taking of testimony thereon and upon receiving argument of counsel, the Court denied the Motion for New Trial, but took under advisement the matter of reconsideration of sentence and on the 8th day of October, 1987, the Court entered an Order denying the motion to reconsider sentence and affirmed the original sentence heretofore entered on the 25th day of November, 1985, where your Petitioner was to serve a period of one (1) year confinement in the Jefferson County Jail. Thereafter, on the 9th day of October, 1987, the Court again granted a stay of execution of sentence through and until the 4th day of November, 1987, at 5:00 o'clock p.m., to permit counsel for Petitioner to file with this Honorable Court a Petition for Appeal from the Trial Court's denial of the Motion for New Trial on the grounds of alleged juror misconduct.

STATEMENT OF FACTS

At the hearing held before the Honorable Thomas Steptoe, Judge of the Circuit Court of Jefferson County on the 5th day of October, 1987, Petitioner called a former petit juror who served on his jury trial in support of his Motion for New Trial. The testimony of the former juror who was called as a witness, Clark Dixon, can be succinctly summarized as follows: Mr. Dixon testified that he is a park ranger with the National Park Service in Harpers Ferry, West Virginia, and has been for fifteen (15) years; that he has four (4) children and is an active participant in the Boy Scout, Cub Scout, and Girl Scout programs in Jefferson County. He testi-

fied that he recalled his service and participation as a juror in the Stephen Holmes case. During his testimony, he was asked what affect the Petitioner's failure to testify on his own behalf had on his decision to vote guilty as a juror.

> "*Question*: Okay, I'll go ahead and just rephrase it or reask the same question. The fact that Mr. Holmes didn't testify on his own behalf, what fact or affect if any did that have on your voting guilty in this case?
>
> *Answer*: Well, we as a jury, that was about one of the last things we considered in our deliberation, the fact that well, it was probably the factor that brought across the verdict as far as . . . Well, he didn't get on the stand and testify for himself. And it was considered that that was considered as far as the final verdict due to the fact he didn't get on the stand.
>
> *Question*: Was it considered favorable or unfavorable?
>
> *Answer*: Unfavorable that he didn't."
>
> (Tr. p. 13, post verdict hearing on 10/5/87)

Over objection of the State, he continued to testify as follows,

> *Question*: Did you feel that the evidence that you heard in the courtroom showed Mr. Holmes was guilty excluding the fact or wiping away the factor . . .?
>
> *Answer*: No.
>
> *Question*: But when considered in light of the fact that he didn't testify, that was a factor?
>
> *Answer*: That was the final factor that was considered."
>
> (Tr. p. 14, post verdict hearing on 10/5/87)

Thereafter, the Circuit Court proceeded to make inquiry of the juror, who explained that during the latter part

of 1986, he initiated a conversation with your Petitioner, Stephen Holmes, and explained that he had had some misgivings about the final outcome of the case. (Tr. pp. 16, 17) Following this testimony being taken and arguments being heard by the Court, the Court denied the Motion for New Trial and thereafter, on the 8th day of October, 1987, reimposed the original sentence of one (1) year confinement in the Jefferson County Jail, but has permitted a Stay of said sentence through and until 5:00 o'clock p.m. on the 4th day of November, 1987, to permit an application to be made to this Court for a further Stay and the granting of this Petition for Appeal.

ASSIGNMENT OF ERRORS

I. IT WAS REVERSIBLE AND PREJUDICIAL ERROR FOR THE TRIAL COURT JUDGE TO REFUSE TO SET ASIDE THE VERDICT OF THE JURY FOLLOWING THE TESTIMONY OF FORMER JUROR CLARK DIXON, WHO TESTIFIED THAT HE AND OTHER JURORS NOT ONLY DISCUSSED PETITIONER'S FAILURE TO TESTIFY IN HIS OWN BEHALF IN REACHING A GUILTY VERDICT, BUT ALSO CONSIDERED IT AGAINST YOUR PETITIONER IN REACHING THE GUILTY VERDICT.

ARGUMENT

I. IT WAS REVERSIBLE AND PREJUDICIAL ERROR FOR THE TRIAL COURT JUDGE TO REFUSE TO SET ASIDE THE VERDICT OF THE JURY FOLLOWING THE TESTIMONY OF FORMER JUROR CLARK DIXON, WHO TESTIFIED THAT HE AND OTHER JURORS NOT ONLY DISCUSSED PETITIONER'S FAILURE TO TESTIFY IN HIS OWN BEHALF IN REACHING A GUILTY VERDICT, BUT ALSO CONSIDERED IT AGAINST YOUR PETITIONER IN REACHING THE GUILTY VERDICT.

In support of his argument, Petitioner first would ask this Court to consider and review that portion of the original jury voir dire wherein juror Dixon was instructed as to the law regarding Petitioner's right to refuse to testify and the juror's statement to the Court that he would adhere to and follow the instruction of law.

> "*Question*: Okay, your name is Mr. Carr, Clark Dixon?
>
> *Mr. Askin*: That's question #2, Mr. Dixon and Mr. Carr . . ."
>
> (Tr. p. 268, trial transcript of proceedings on 8/15/85)
>
> "*Question*: Does any member of the jury panel feel that Stephen Holmes is probably guilty of the charge against him if he does not testify in his own behalf?
>
> *Answer*: (No response.)
>
> *Question*: Would each member of the jury agree to follow the Court's instruction that Mr. Holmes has a constitutional right not to testify and that you should not consider whether he testifies or not in deciding whether the State has proved its case beyond a reasonable doubt?
>
> *Answer*: (No response.)
>
> (Tr. pp. 268-270, trial transcript of proceedings on 8/15/85)

Petitioner submits that from the testimony of juror Dixon and the conclusions drawn by the Court, it is clear that the juror failed to follow not only the original instruction that was given to him when he was selected as a juror, but he also failed to follow the instruction which was read to the jurors by the Court following the completion of testimony and before closing arguments, to-wit:

> "The Defendant, Stephen Holmes, has no duty to take the stand as a witness in his own behalf, and

> if he does not do so, this is not evidence, and you should draw no inference therefrom as to his guilt or innocence." *You should entirely disregard and not discuss it.*" [Emphasis added] (Tr. p. 64, trial transcript of proceedings on 8/19/85)

Petitioner submits that had juror Dixon answered the original question posed by Judge Steptoe by informing the Court and counsel he was unwilling to follow the instruction of the Court not to consider Petitioner exercising his right not to testify, he would have been stricken for cause and this issue would never have arisen. To permit a juror to inform the Court he will follow the law in this regard, but thereafter consider adversely against a defendant the exercise of his Constitutional right not to testify and then preclude a defendant from raising the issue once it becomes known to him would insulate from correction the most egregious of Constitutional violations. Petitioner would hope that this not be accepted as the law in West Virginia. It is Petitioner's contention that the discussion and consideration by jurors of the failure of a defendant to testify on his own behalf is to consider an extraneous matter outside the evidence. Petitioner would ask the Court to consider the following cases in reaching the conclusion that the consideration of a defendant not having testified is an extraneous matter and that upon this becoming known to the Court, reversal of a conviction is mandatory. In *Crockett v. Commonwealth*, 187 Va. 687, 47 S.E.2d 377 (1948), the Virginia Supreme Court discussed whether or not the quartering of the jury for the night in a hotel overlooking the scene of a homicide, though innocent in purpose and unauthorized by the Court was prejudicial to the defendant. Not only did the Court find this to be a violation of the defendant's right to be present at a view, the Court was concerned with whether or not the jurors may have received extraneous impressions and/or could make deductions from what they observed,

> "With the last conclusion we cannot agree. To say that no jurors received any impressions or could make any deductions from what lay before them is to say that normal men do not use or exercise their sense of sight. We certainly cannot assume that they closed their eyes. If it be assumed that only a part but not all the jurors looked at the surroundings in and about where the homicide was committed, and another part did not look this would have afforded those who looked an opportunity to get impressions which the others did not get. In any event the jury was at or near the scene of the killing. For one whole day they had heard these various points and urbana referred to and described in evidence. With this information it would have been natural for them or some of them to have looked over the scene and to have compared what they saw with what they had heard in the testimony." 47 S.E.2d at 385.

The Court went on to discuss a number of prior Virginia decisions where jurors apparently considered matters outside of the evidence in the courtroom in reaching a verdict. See *Hickerson v. Berner*, 186 W.Va. 66, 41 S.E.2d 451, *Litz v. Harmon*, 151 Va. 363, 144 S.E. 477. Following a discussion of these cases, the Court went on to quote from 39 Am. Jur., New Trial, Sec. 78, p. 93,

> "It is always improper for a juror to discuss a cause which he is trying as a juror or to receive any information about it except in open court and in a manner provided by the law, and it is well settled that the reception of any evidence by the jury, particularly in a criminal case, outside of that produced at the trial, is ground for setting aside the verdict and granting a new trial whenever there is sufficient ground to suspect that one of the parties, in the case of a civil suit, or the accused, in a criminal case, has been prejudiced thereby."

The two most recent West Virginia cases on jury misconduct are *State v. Schotchel*, 168 W.Va. 545, 285 S.E.2d 384 (1981) and *State v. Dudley*, 358 S.E.2d 206 (W.Va. 1987). In *Schotchel, supra*, this Court exhaustively discussed what type of juror misconduct would support a post-trial motion for new trial. The Court recognized that the issue is to be reviewed by the Appellate Court as a question of whether the trial court judge abused his discretion and in so deciding, the Court is to look to the record to see whether there is clear and convincing evidence that the jury was influenced. Petitioner would submit that juror Dixon's testimony meets this test and the only question that remains is whether or not the consideration of the Petitioner's refusal to testify is extrinsic to the jury's deliberative process. In *Schotchel, supra*, this Court recognized,

> "A majority of courts recognize that a jury verdict may be impeached for matters of misconduct extrinsic to the jury's deliberative process. This point is summarized in 76 Am. Jur. Second Trial, Sec. 23 (1975). 'The rule that the testimony of jurors will not be received to impeach their verdict is subject in many, but apparently not all, jurisdictions to a recognized exception that affidavits of jurors may be received to show matters occurring during the trial not essentially in hearing in the verdict, that is, not falling within or pertaining to the legitimate issues in the case.' "

Petitioner submits that whether the defendant did or did not testify is not an issue to be discussed or considered by the jury.

In *State v. Dudley, supra*, this Honorable Court discussed *State v. Schotchel, supra*, and found,

> "Here there was no evidence of any extrinsic influence or misconduct which would warrant further inquiry into the allegations presented. The jurors, in

> response to questioning by the Judge in open court, indicated that each of them concurred in the verdict. Accordingly, the trial court properly refused to consider the matter further."

The evidence offered in support of juror misconduct in *Dudley, supra,* was that pressure had been brought to bear upon one of the jurors that caused him to acquiesce in the verdict. Petitioner would again distinguish the facts in his case from the mere allegations of threats and intimidations in the jury room, which may very well be part of the give and take inherent in deliberation, but clearly, different than the acknowledged consideration of an extraneous matter that is in violation of one's Constitutional rights.

Petitioner would also ask the Court to consider the decision of *State v. McClure,* —— W.Va. ——, 253 S.E.2d 555 (1979). Although *McClure, supra,* does not involve jury misconduct as the subject of a post-verdict motion, the conviction was reversed when it became apparent from a note sent to the Judge during jury deliberation that the jury desired the defendant to testify. The Court found reversible error in the Trial Court refusing and failing to re-instruct the jury as requested by the defendant as to the law that defendant's right to decline to testify can cause the jury to draw no inference of guilt. This Court held,

> "Based on our cases requiring that a jury be clearly and properly advised of the law and the ruling of the Supreme Court of the United States in *Taylor,* we conclude that where it clearly and objectively appears in a criminal case in the statements of the jurors that the jury has failed to comprehend an instruction on a critical element of the crime or a constitutionally and protected right, the trial court must on request of defense counsel, reinstruct the jury." 253 S.E.2d at 558

Your Petitioner says that it would be most unfair to a defendant to only provide him relief from juror misconduct regarding their adverse consideration of his failure to have testified when it becomes known during jury deliberations. Petitioner submits that a defendant who becomes aware following the verdict that the jury improperly considered his failure to testify should have as much right to have the error corrected as does the defendant fortunate enough to have the jury make known their improper activity while still deliberating. Petitioner submits that to permit the jury to clothe and cloak their improper consideration on the defendant's right to remain silent and thus, insulate same from review would be extremely unfair to criminal defendants in this State.

Petitioner would ask the Court to consider the following decisions from other jurisdictions that are supportive of his position.

A case directly on point and one Petitioner would request this Court to consider as controlling is *Batres v. State*, 727 S.W.2d 83 (Tex. App.-San Antonio 1987). In this case, the Texas Court of Appeals reversed a conviction for sexual assault as a result of the jurors' discussion of the defendant's failure to testify. In this decision, the Court also discussed a number of prior decisions, see *State v. Smith*, 530 S.W.2d 827 (Tex. Crim. App. 1975), *Nacol v. State*, 590 S.W.2d 481 (Tex. Crim. App. 1979), and *Davis v. State*, 266 S.W.2d 174 (Tex. Crim. App. 1953) and reached the following conclusion:

> "Although the jurors' testimony conflicts as to the discussions affect, it is apparent that the jury thoroughly discussed the Appellant's failure to testify. In *Davis* the Court of Criminal Appeals held that the Trial Court abused its discretion in not granting a new trial where there was evidence of repeated discussions made during jury deliberations on the failure of the accused to testify." 272 S.W.2d at 86

Your Petitioner would submit that from the record in his case, the same conclusion must be reached as to the action of his jury during deliberation.

Petitioner feels he is obligated to point out to this Honorable Court the decision in *Heath v. State*, 485 So. 2d 1226 (Ala. Cr. App. 1986), where the evidence offered at the hearing upon a motion for new trial was that the jurors had taken into consideration adversely to the defendant that fact that he had not taken the stand as a witness. Following consideration of the juror's testimony, the Court found there to be no error.

Petitioner would submit that the following testimony of Mr. Dixon, to-wit:

> "*Question*: Okay, I'll go ahead and just rephrase it or reask the same question. The fact that Mr. Holmes didn't testify on his own behalf, what fact or affect if any did that have on your voting guilty in this case?
>
> *Answer*: Well, we as a jury, that was about one of the last things we considered in our deliberation, the fact that well, it was probably the factor that brought across the verdict as far as . . . Well, he didn't get on the stand and testify for himself. And it was considered that that was considered as far as the final verdict due to the fact he didn't get on the stand.
>
> *Question*: Was it considered favorable or unfavorable?
>
> *Answer*: Unfavorable that he didn't."
>
> (Tr. p. 13)

is clearly distinguishable from the one question asked by a juror in *Heath, supra*, where there was no evidence or proof offered that the testifying juror or any other juror considered it adversely to the Petitioner. Also see *State v. Cross*, 519 A.2d 272 (N.H. 1986) and *People v. Reyes*, 728 P.2d 349 (Colo. App. 1986) wherein Courts ruled on

their facts contrary to the position of your Petitioner, but Petitioner feels they are distinguishable on the individual facts of each case.

In *Escarcega v. State*, 711 S.W.2d 400 (Tex. App.—El Paso 1986), the Court found from affidavits of two jurors that they had discussed whether or not the defendant and his co-defendant would be placed on probation and one juror also testified that he believed the defendant *Escarcega* was not guilty and that he would have voted not guilty had he been aware that *Escarcega* was ineligible for probation. In reaching its conclusion, the Court found that the jurors had failed to follow the following instruction,

> ". . . The sole duty at this time is to determine the guilt or innocence of the defendant under the indictment in this case in this cause, and restrict your deliberations solely to the issue of guilt or innocence of the defendant."

In considering whether this instruction was followed in light of the two jurors' testimony, the Court went on to hold,

> "As indicated by testimony at the hearing on the motion for new trial, the jurors disregarded these instructions. The test for jury misconduct asks first whether there was misconduct and second did it result in harm. [Citation omitted] Clearly the facts of this case meet both requirements. Furthermore the state failed to introduce any controverting evidence. Thus no issue of fact existed for the trial court to determine. In such cases a new trial should be granted." 711 S.W.2d at 402

In *Pendleton v. State*, 734 P.2d 693 (Nev. 1987), the Court reversed a conviction of felony driving while under the influence as a result of a juror having visited an accident scene and during deliberations related to other jurors that the defendant's theory of causation of acci-

dent was unbelievable. The Court in reaching this conclusion relied upon the prior decision of *Russell v. State*, 99 Nev. 265, 661 P.2d 1293 (Nev. 1983), where a juror's investigation of driving time between the cities of Reno and Carson City was considered by the panel. The Court specifically found,

> "The facts investigated by the juror were crucial to the defense's theory of the case and the juror was not subject to cross-examination about traffic conditions, road conditions, weather, and other variables. We find the instant case remarkably similar to *Russell*. There was sufficient misconduct to mandate a new trial." 734 P.2d at 696

Your Petitioner is aware of the recent United States Supreme Court decision, *Tanner v. United States*, 22 Federal Rules of Evidence Service 1143 (1987), wherein the Court found that evidence of juror ingestion of alcohol or drugs is not an improper outside influence about which jurors may testify under Rule 606(b). Petitioner would submit, however, that Judge Steptoe's conclusion that the language of Rule 606(b) of the Federal Rules of Evidence is sufficiently distinguishable in its language from West Virginia Rule 606(b) that *Tanner, supra*, is not a controlling decision. (Tr. p. 7, post-verdict hearing on 10/5/87)

In *In Re Stankewitz*, 708 P.2d 1260 (Cal. 1985), the Supreme Court granted a petition for habeas corpus on the ground that juror misconduct occurred when a juror in a murder trial made erroneous statements as to the law on a critical issue. The Court recognized that

> "When extraneous law enters a jury room—i.e., a statement of law not given to the jury in the instructions of the court—the defendant is denied his Constitutional right to a fair trial unless the people can prove that no actual prejudice resulted." 708 P.2d at 1262

The Court went on to hold,

> "In our system of justice it is the trial court that determines the law to be applied to the facts of the case, and the jury is 'bound' . . . to receive as law what is laid down as such by the court. 'Of course it is a fundamental and historic precept of our judicial system that jurors are restricted solely to the determination of factual questions and are bound by the law as given them by the court. They are not allowed either to determine what the law is or what the law should be.' [Citations omitted] In the case at bar the court correctly instructed the jurors at the very beginning of its charge that '. . . your duty is to apply the rules of law that I state to you to the facts as you determine them' and that you must accept and follow the rules of law as I state them to you." 708 P.2d at 1263

The Court went on to discuss a number of prior decisions wherein juror misconduct had been found to exist and ruled that the misconduct of the juror Knapp raised a presumption of prejudice.

In *Randolph v. Commonwealth*, 716 S.W.2d 253 (Ky. 1986), the Court set aside a conviction and granted a new trial, where a juror failed to reveal on voir dire that she was employed by the Commonwealth Attorney's office. The portion of the opinion that is most applicable to your Petitioner's case is the conclusion by the Supreme Court of Kentucky that,

> "A verdict is improper when a peremptory challenge is not exercised by reason of false information. The question is not whether an improperly established tribunal acted fairly but whether the tribunal was established at all."

Petitioner would submit that had juror Dixon answered in the affirmative to the questions posed by the Trial Court Judge during jury voir dire (Tr. pp. 269, 270), he would have been peremptorily struck, if not struck for cause.

In *People v. Stephens*, 689 P.2d 666 (Colo. App. 1984), the Court discussed the issue of juror misconduct. Although the conviction was affirmed, the Court discussed circumstances when it would be proper to grant a new trial.

> "Following trial on the merits the granting of a new trial may be justified by the discovery of lack of candor on the part of the juror during voir dire. *People v. Borreli*, 624 P.2d 900 (Colo. App. 1980) However defendant must establish the truth of the allegations on which he bases his motion for new trial and produce evidence of the alleged juror misconduct."

Your Petitioner would submit that this is the proper test to apply, which would permit a defendant to not only have a juror testify as to what extraneous factors he considered, but what affect it had upon his verdict. See also *Wiser v. People*, 732 P.2d 1139 (Colo. 1987)

In *Borreli, supra*, the Court reversed and remanded a conspiracy to commit first degree murder and first degree assault on the ground that,

> "If the lack of candor on the part of the juror is not discovered until after the trial, it may justify the granting of a new trial." 624 P.2d at 900

The Court went on to conclude,

> "Lack of candor on part of juror during voir dire as to fact that she was being treated for serious personality disorder, together with juror's severe mental illness and long continued use of psychoactive drugs, operated to deny defendant his right to make an intelligent decision as to whether to challenge juror for cause, exercise a peremptory challenge, or accept the juror . . . A defendant has the right to exercise all of his peremptory challenges, and when a juror misrepresents or conceals material

in relevant matters, that right, as well as the right to challenge for cause is impaired. Under the circumstances present here, the lack of candor on the part of the juror during voir dire denied defendant his right to make an intelligent decision as to whether to challenge the juror for cause, exercise his peremptory challenge, or accept the juror." 624 P.2d at 903

From these cases, Petitioner would ask the Court to find that for either of the following two reasons juror misconduct has been found to exist. If the Court adopts the narrow restrictive view that the admission by juror Dixon that he considered Petitioner's failure to testify in voting guilty is intrinsic evidence, the Court can still find that Dixon's testimony that he and other jurors discussed the issue is extraneous evidence that is presumptively prejudicial without considering what affect it had on his mind or the minds of the other jurors during the deliberation process. Petitioner, however, would ask this Court to reconsider its decision in *Schotchel, supra*, and follow those cases that permit not only testimony about what matters were discussed, but what affect they may have had on the individual juror's deliberative process. If the Court is not inclined to adopt this as a general rule to so hold when the extraneous subject matter discussed by the juror involves an adverse consideration of a Constitutional right or issue.

STEPHEN HOLMES
By Counsel

/s/ Steven M. Askin
STEVEN M. ASKIN
Attorney for Petitioner
Askin, Pill, Scales & Burke, L.C.
P.O. Box 1938
Martinsburg, WV 25401
(304) 263-0909

EXHIBIT 1

* * * *

[64] From these considerations and all other conditions and circumstances appearing from the evidence, you may give to the testimony of the witness such credit and weight as you believe it entitled to receive.

If you believe that any witness in this case has knowingly testified falsely as to any material fact, you may, after considering and weighing the testimony of such witness, disregard the whole of the testimony of such witness or give it or any part thereof, such weight and credit as you believe it to be entitled to receive.

The burden is on the State of West Virginia to prove the guilt of the Defendant beyond a reasonable doubt. The defendant is not required to prove his innocence.

The Defendant, Stephen Holmes, has no duty to take the stand as a witness in his own behalf, and if he does not do so, this is not evidence, and you should draw no inference therefrom as to his guilt or innocence. You should entirely disregard and not discuss it.

* * * *

EXHIBIT 2

* * * *

[268] THE COURT: Mr. Askin?

MR. ASKIN: Yes, sir, I have some questions.

BY MR. ASKIN:

Q Ladies and gentlemen, if you don't understand any of my questions, please let me know and I'll be happy to repeat them. Has any member of the jury panel either in military or civilian life ever been a police officer prior to today? Has any member of the jury panel prior to today been a police officer in the military or civilian life?

A (Affirmative response.)

Q Okay, your name is Mr. Carr, Clark Dixon?

MR. ASKIN: That's question #2, Mr. Dixon and Mr. Carr.

BY MR. ASKIN:

Q Is any member of the jury panel related by blood or marriage to anyone who is presently a police officer?

A (No response.)

Q Question four, does any member of the jury panel have a close friend or associate who is a police officer?

A (No response.)

Q Five, would any member of the jury panel be more likely to believe a police officer's sworn testimony than the sworn testimony of a witness who's not a police officer?

A (No response.)

Q Six, has any member of the jury panel ever been the [269] victim of a crime of sexual violence?

A (No response.)

Q Seven, is any member of the jury panel related by blood or marriage to someone who has been the victim of a crime of sexual violence?

A (No response.)

Q Has any member of the jury panel ever been a witness for the State of West Virginia in a criminal case?

A (No response.)

Q Nine, has any member of the jury panel ever been a client of Mike Thompson, the prosecutor, Ralph Lorenzetti, his assistant, Mike Cassell, his assistant, former Jefferson County prosecuting attorney Braun Hamstead, or former Jefferson County assistant prosecutor Melody Gaidrich?

A (No response.)

Q Does any member of the jury panel know on a non-professional but social basis any of these individuals: Mr. Lorenzetti, Mr. Cassell, Mr. Hamstead or Ms. Gaidrich?

A (No response.)

Q Does any member of the jury panel feel that Steven Holmes is probably guilty of the charge against him if he does not testify in his own behalf?

A (No response.)

Q Would each member of the jury agree to follow the [270] Court's instructions that Mr. Holmes has a constitutional right not to testify and that you should not consider whether he testifies or not in deciding whether the State has proved it's case beyond a reasonable doubt?

A (No response.)

Q Is there anything at all about the crime of sexual assault upon a minor that bothers you to such a degree that you would not be able to sit as a juror and consider only the evidence and the instructions as to the law by the Court in reaching your verdict?

A (No response.)

Q Does anyone on the jury panel have children?

A (Affirmative response.)

THE COURT: I guess it would be easier to say, does anyone on the jury panel not have children? Okay, that would be Ms. Vernon, Mr. Bertuccio. . .

MR. ASKIN: That's my question number 16.

THE COURT: Question 16.

MR. ASKIN: Everyone is affirmative to that except Ms. Vernon and Mr. Bertuccio, your Honor.

THE COURT: Very well.

* * * *

STATE OF WEST VIRGINIA,

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 5th day of November, 1987, the following order was made and entered.

STATE OF WEST VIRGINIA

vs.

STEPHEN HOLMES

On a former day, to-wit, November [4], 1987, came the petitioner, Stephen Holmes, by Askin, Pill, Scales & Burke, and Steven M. Askin, his attorneys, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Jefferson County rendered on the 5th day of October, 1987, with the record therein accompanying the petition, which being seen and inspected by the Court the appeal prayed for is refused.

A True Copy

Attest: /s/ [Illegible]
Clerk, Supreme Court of Appeals